

IN THE MATTER OF THE ARBITRATION BETWEEN

|                         |   |                       |
|-------------------------|---|-----------------------|
| TEAMSTERS UNION,        | ) | FEDERAL MEDIATION AND |
| LOCAL 970,              | ) | CONCILIATION SERVICE  |
|                         | ) | CASE NO. 13-00560     |
|                         | ) |                       |
| Union,                  | ) |                       |
|                         | ) |                       |
| and                     | ) |                       |
|                         | ) |                       |
| LIBERTY CARTON COMPANY, | ) | DECISION AND AWARD    |
|                         | ) | OF                    |
| Employer.               | ) | ARBITRATOR            |

APPEARANCES

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On February 21, 2013, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by refusing to excuse the grievant, Washington P. Castillo, from working eight hours of mandatory weekend overtime and then deducting eight

hours from his quota of unexcused absences allowed under the Employer's attendance policy. Post-hearing written argument was received by the arbitrator on April 13, 2013.

#### FACTS

The Employer manufactures corrugated packaging at its plant in Golden Valley, Minnesota, a suburb of Minneapolis. The Union is the collective bargaining representative of about 170 employees of the Employer who work in production and maintenance classifications.

The grievant has been employed at the Employer's Golden Valley plant since May of 2000. During the summer of 2012, when the events occurred that gave rise to the present grievance, he worked as a first-shift Stacker on a Corrugator machine, with a usual workweek of Monday through Friday.

On July 16, 2012, the parties executed a labor agreement, the nominal term of which is from January 15, 2012, through January 15, 2017 (hereafter, the "current labor agreement"). The preceding labor agreement between the parties had a nominal term from January 15, 2009, through January 15, 2012 (hereafter, the "2009-2012 labor agreement" or sometimes, the "previous labor agreement").

The Employer has adopted a "no-fault" attendance policy, which has been in effect at least since March 1, 2004. Below, I set out relevant excerpts from the attendance policy:

. . . We understand you will have illnesses, family commitments, problems and other issues that will occasionally prevent you from being at work. To help reduce the impact of employee absences on the business

while accommodating your health and family emergency needs, an annual allowance of 48 hours (6 full work days) is established for each employee.

The 48 hours are not extra vacation hours or simply time for you to take off work without pay. This allowance is intended to be used for infrequent absences as a result of personal illness or injury, family illness or injury, personal business, car trouble, bad weather or other emergencies. You do not need to bring in a doctor's slip, or any other form of documentation. We track both the amount of time and the number of occurrences away from work in a twelve month period from March 1 through February of the following year.

This allowance is the maximum amount of time that an employee can be absent from work, including scheduled overtime, for reasons other than planned pre-approved vacation, or the excused absences listed below before an employee will lose his/her job. After you have used 24 hours or reached 8 occurrences, you will be subject to appropriate corrective action for additional absences, regardless of the reason for the absence.

Hours will be counted in 15 minute increments. Some examples:

- If you are late (3 minutes or more) or leave early, to include scheduled overtime, a minimum of 15 minutes will be counted.
- If you are late 25 minutes, 30 minutes will be counted.
- If you are late, leave early or are gone for 2 hours, then 2 hours will be counted.
- If you are gone for 6 1/2 hours then 6 1/2 hours will be counted.
- If you are gone for a full day, 8 hours will be counted (8-hours/day maximum).

Attendance expectations are cited in our work rules. Violation of this program is also a violation of work rules. You must talk with your supervisor as soon as you know that you will need to be absent or leave work early.

- You are required to follow the call in procedure if you have an unexpected personal or family illness or emergency (2 days without calling in is considered a voluntary quit). . .

Time off for absences as listed in the contract (funeral, jury duty, etc.) leaves required by law, or subpoenas beyond your control or through no fault of your own, and approved leaves of absences will not be counted against your allowance, but you must notify your supervisor as far in advance as possible. Other absences will count against your allowance. . .

HOURS:

- If you have used 24 hours of your allowance you will receive a reminder of our attendance policy.
- If you have used 32 hours you will receive a First Written Warning.
- If you have used 40 hours you will receive a Final Written Warning.
- If you use more than 48 hours you will be dismissed from employment.

The parties use the term, "Individual Hours" or "IH," to refer to hours of unexcused absence charged to an employee's attendance record.

During the term of the parties' 2009-2012 labor agreement, the Employer and the Union discussed a set of rules relating to vacations. These rules were adopted in June of 2009 as the "Golden Valley Vacation Rules" (hereafter, "The 2009 Vacation Rules"), which I set out below:

1. All vacation requests must be submitted on the Vacation Request Form.
2. Maximum number of employees on vacation by department, subject to approval by the supervisors:
  - a. Corrugator: 1 per day per shift
  - b. [I omit other listed classifications.] . . .
- . . .
4. Vacation requests made after March 1st will be handled on a first come first served basis. An answer will be given to the employee within three working days whenever possible.
5. Same Day Vacations: From March 1st to March 1st employees may use up to three vacation days in place of taking IH hours. Requests can only be for full days of vacation. However, any time this type of vacation day is used the employee will not be eligible for the perfect attendance reward [of an additional four hours of vacation] during the quarter in which the day is used.

The parties' arguments make the following provisions of the current labor agreement relevant:

Section 9.01(a). For departments scheduled for five (5) days, the regular work day or shift period shall consist of eight (8) hours. The regular work week shall consist of forty (40) hours Monday through Friday unless otherwise agreed to.

(b). . . .

(c). Overtime at the rate of time and one-half (1 1/2) the employee's regular hourly rate shall be paid for all hours worked in excess of eight (8) hours per day and forty (40) hours per week, whichever is greater. . .

(d). Overtime shall be offered to the senior qualified employees in the department. If additional workers are needed, the plant seniority list shall be used provided the employee has the ability to do the work required.

(e). . . .

(f). Overtime scheduled for Saturday shall be posted by 2:30 P.M. the preceding Thursday.

(g). Weekend overtime will be voluntary for employees who have been granted an approved vacation day for Friday or Monday of that weekend.

(h). Weekend overtime: an excused absence (under the attendance program) for a specific weekend can be granted to an employee provided the request is made two (2) weeks in advance. Approval will depend on workload and the employee will be notified of approval within three (3) days of the request.

. . .

The provisions of the current labor agreement that are set out above were the same in the parties' 2009-12 labor agreement. The parties added the following provisions to Article 9 in bargaining for the current labor agreement:

Section 9.05. In daily overtime situations where needed employees are not readily available, the Company may use any available employees to resolve the situation without penalty. However, the Company must first utilize the Emergency On-Call List and call in seniority order all those people on the List who are qualified to perform the available work before it can use non-bargaining unit people for the job. The Emergency On-Call List sign-up sheet will be posted each Wednesday for the following Emergency On-Call Week; the Emergency On-Call Week runs from Midnight Sunday to Midnight the following Sunday. . .

Section 9.06. In any overtime situation in which senior employees do not exercise their right to work overtime, the Company may require the junior qualified employees to work provided those employees receive a minimum of twelve (12) hours' notice.

As part of their bargaining for the current labor agreement, the parties adopted a "Letter of Memorandum - Vacation Rules." The Letter of Memorandum - Vacation Rules (hereafter, merely the "Letter of Memorandum") was negotiated and executed by the parties as part of their bargaining for the current labor agreement; it replaces the 2009 Vacation Rules. Both parties presented testimony, described below, about the bargaining that led to the adoption of the Letter of Memorandum.

Parts of the Letter of Memorandum are set out below:

3. On any given day, the Company will permit the following minimum number of employees to be on vacation if such vacation is requested. Vacation allowed in excess of these minimums on any given day will be within the Company's sole discretion. The Company will use the Emergency On-Call List to cover any daily overtime needed because employees are on vacation. If employees on the Emergency On-Call List are not sufficient, the Company may utilize any bargaining unit employees or any supervisory or other non-bargaining unit personnel of the Company except temporary agency employees.
  - a. Corrugator: 1 per day per shift
  - b. [I omit other listed classifications]. . .
  - . . .
5. Vacation requests made after March 1st will be handled on a first come first served basis. An answer will be given to the employee within three working days whenever possible.
6. Same Day Vacations: From March 1st to March 1st employees may use up to three vacation days in place of taking IH hours with the following rules in place:
  - a. The first two days of vacation that an employee uses under this section are not subject to supervisor approval; the third day is subject to supervisor approval.

- b. Requests must be made prior to the start of the shift.
- c. Each of the three days must be full days of vacation.
- d. The two days not subject to supervisor approval cannot be used on the day before or after a holiday.
- e. An employee using a call-in vacation day will not be eligible for the perfect attendance reward [of an additional four hours of vacation] during the quarter in which the day is used.

The following circumstances led to the present grievance.

In late spring of 2012, the grievant began planning to attend the 80th birthday party of his wife's mother. The party was to be held in Chicago, Illinois, on Saturday, August 25. The grievant intended to drive from Minneapolis to Chicago on Friday, August 24, accompanied by his wife, her mother and his two children, and he planned to drive back to Minneapolis on Sunday, August 26.

On June 5, 2012, in preparation for the Chicago trip, the grievant gave his supervisor, Dennis Welch, a "Vacation Request Form," requesting "Approval" of one day of vacation, to be taken on Friday, August 24, 2012. At the time, the grievant had about fifteen days of accrued vacation. The grievant's Vacation Request Form was returned to him, marked "Denied." The denial was initialed by Welch and signed by Ross Kwiatkowski, Production Superintendent for the first and third shifts. Though the form does not state the date of the denial, the evidence indicates that the denial was approximately contemporaneous with the date of the request, June 5, 2012.

For about a year and a half previous to the summer of 2012, the grievant worked a substantial amount of overtime -- working a total of about fifty-five to as much as sixty-nine hours per week, including daily overtime and mandatory Saturday

overtime. During the months previous to the end of August, 2012, he worked mandatory Saturday overtime in many weeks, in addition to a substantial amount of daily overtime.

The grievant testified that about two weeks before Friday, August 24, he told Welch that he was going to take a same-day vacation day on August 24 and that he was not going to be available for mandatory overtime on Saturday, August 25. Welch told the grievant 1) that, if he was posted to work mandatory Saturday overtime on August 25 and did not work that day, his absence would be considered an unexcused absence under the attendance policy even if he took a same day vacation day on Friday, August 24, and 2) that, in those circumstances, he would be charged with eight hours of IH time.

Lars Lodoen, first shift Union Steward, testified that the grievant asked him to find out whether management agreed with the position Welch had taken -- that the grievant would be charged with IH hours if absent after being posted for August 25 mandatory Saturday overtime, despite taking a same day vacation day on Friday, August 24. Lodoen testified that he asked Barbara J. Robbins, Human Resources Manager, if she agreed with the position Welch had taken and that, after Robbins consulted with John E. Proulx, Area Manufacturing Manager, she told Lodoen that management agreed with the position Welch had taken.

For Thursday, August 23, the grievant was scheduled to work a total of twelve hours -- four hours of early overtime, starting at 3:00 a.m. and then eight hours on his usual first-shift assignment, from from 7:00 a.m. till 3:00 p.m. To fulfill

that work schedule, he began working at 3:00 a.m., and he continued working till 11:00 a.m., but then he used four hours of vacation time (received in a previous quarter for perfect attendance) to complete the twelve hours that had been scheduled. Thus, the grievant left the plant just after 11:00 a.m. on Thursday, August 23. Sometime between noon and 2:30 p.m. on that day, the Employer posted the mandatory Saturday overtime schedule for Saturday, August 25, in compliance with Section 9.01(f) of the current labor agreement, which provides that "overtime scheduled for Saturday shall be posted by 2:30 p.m. the preceding Thursday." The Saturday mandatory overtime list for August 25 required the grievant and the other eight workers assigned to the Corrugator to work overtime that day.

At about 3:00 a.m., on Friday, August 24, the grievant used the Employer's call-in line to report that he was using a same day vacation day for that day. It was the first same day vacation day he used during that March-to-March period, and he had about fourteen days of accrued vacation.

The grievant drove to Chicago with his family on August 24, and he attended the birthday party for his mother-in-law on August 25, thus being absent from work that day. He returned to Minneapolis on Sunday, August 26, and reported for work as scheduled on Monday, August 27. The grievant was charged with an unexcused absence for not having worked mandatory Saturday overtime on August 25, and his attendance record was charged with eight hours of IH time. On August 29, the Union brought the present grievance, which alleges that the Employer violated provisions of the labor agreement, including the Letter of

Memorandum, by charging the grievant with IH hours for not having worked on Saturday, August 25.

#### DECISION

Contract Interpretation. A primary issue in this case is one of contract interpretation. If, as the Union argues, the Employer violated the labor agreement by treating the grievant's absence from mandatory Saturday overtime on August 25 as unexcused, it did not have just cause to discipline him. Conversely, if the Employer did not violate the labor agreement by treating the grievant's August 25th absence as unexcused, the Employer had just cause for the discipline.

Below, I repeat the provisions of the labor agreement that relate directly to the issue of contract interpretation:

Section 9.01(g). Weekend overtime will be voluntary for employees who have been granted an approved vacation day for Friday or Monday of that weekend.

Section 9.01(h). Weekend overtime: an excused absence (under the attendance program) for a specific weekend can be granted to an employee provided the request is made two (2) weeks in advance. Approval will depend on workload and the employee will be notified of approval within three (3) days of the request.

Paragraph 6 of the Letter of Memorandum. Same Day Vacations: From March 1st to March 1st employees may use up to three vacation days in place of taking IH hours with the following rules in place:

- a. The first two days of vacation that an employee uses under this section are not subject to supervisor approval; the third day is subject to supervisor approval.
- b. Requests must be made prior to the start of the shift.
- c. Each of the three days must be full days of vacation.
- d. The two days not subject to supervisor approval cannot be used on the day before or after a holiday.

- e. An employee using a call-in vacation day will not be eligible for the perfect attendance reward [of an additional four hours of vacation] during the quarter in which the day is used.

Witnesses for the Employer testified that the grievant's two early requests for vacation on August 24 -- one made on June 5, 2012, and the other made about two weeks before August 24 -- were denied because the grievant's supervisor knew at the time of both requests that the only other first-shift employee trained as a Corrugator Stacker had, before June 5th, reserved August 24 as a vacation day and had it approved (thereby also securing an exemption from Saturday overtime on August 25). According to that testimony, if the grievant did not work on August 25, the Employer would have to shut down other machines needed in operations in order to use an employee with training as a Corrugator Stacker.

The Union argues that the Employer could have used the Emergency On-Call List, established by Section 9.05 of the current labor agreement, to secure a replacement employee with adequate training. The Employer makes several responses to this argument -- 1) that the Emergency On-Call List uses employees who have volunteered to be called in by signing the list each week and that employees do not volunteer, and 2) that the Emergency On-Call List applies only to daily overtime, not to weekend overtime.

The parties' arguments about contract interpretation focus on Section 9.01(g) of the labor agreement and on Paragraph 6(a) of the Letter of Memorandum -- also part of the labor agreement. (Hereafter, for simplicity, I refer to these two

contract provisions merely as "Section 9.01(g)" and "Paragraph 6(a).")

The Union makes the following arguments. Section 9.01(g) requires the Employer to treat weekend overtime as "voluntary for employees who have been granted an approved vacation day for Friday or Monday of that weekend." The same day vacation day the grievant used on Friday, August 24, was the first same day vacation day he used that vacation year (March 1 to March 1), and, therefore, under Paragraph 6(a), its use was "not subject to supervisor approval." The Union argues that, because Friday, August 24, was a same day vacation day "not subject to supervisor approval," it should be treated, as "an approved vacation day" granted to the grievant, thereby making his assignment to Saturday overtime on August 25 "voluntary," and exempting him from mandatory overtime on that day -- as provided in Section 9.01(g). Therefore, the Union argues, the Employer did not have just cause to charge the grievant with an unexcused absence for his non-attendance on August 25, reducing his allowance of IH hours by eight hours.

The Employer concedes that, by force of Paragraph 6(a), the grievant's early morning call-in on August 24, by which he gave notice of his intention to use a same day vacation day for that day, was "not subject to supervisor approval." It also concedes that, because Paragraph 6(a) made it unnecessary to have supervisor approval for the same day vacation day itself, i.e., Friday, August 24, the grievant should not be charged (and he was not so charged) with an unexcused absence for his non-attendance on August 24.

The Employer argues, however, that in order to make Saturday overtime voluntary under Section 9.01(g), that provision requires that an employee be "granted an approved vacation day for Friday or Monday of that weekend." The Employer argues that the grievant's requests for vacation on August 24 were never "approved" and that, to the contrary, he was clearly denied such approval each time he sought it -- on June 5, 2012, and again about two weeks before August 24.

Both parties presented testimony from bargaining team members who negotiated the provisions of the current labor agreement -- for the Union, Lodoen and Scott A. Gelhar, its Secretary-Treasurer, and for the Employer Robbins and Proulx. I summarize that evidence as follows. Witnesses for both parties testified that, after the 2009 Vacation Rules were adopted in June of 2009, the parties disagreed about the proper administration of its Paragraph 5 -- the "Same Day Vacations" provision, which permitted employees to "use up to three vacation days in place of using IH hours." As the Union interpreted the provision, an employee was entitled to use all three same day vacation days without obtaining the approval of his or her supervisor. The Employer, however, interpreted the provision as requiring approval by the the employee's supervisor for the use of all three same day vacation days. In practice, supervisors varied substantially in giving approval to requests for same day vacation. Union witnesses testified that employees were concerned about the uncertainty of obtaining such approval.

In late 2011 and early 2012, as the parties bargained about the provisions of the current labor agreement, they spent many days discussing revision of the 2009 Vacation Rules. As I have indicated above, eventually that revision was adopted in the part of the current labor agreement entitled, "Letter of Memorandum," Paragraph 6 of which establishes the parties' new agreement about same day vacations.

Paragraph 6(a) shows the parties' compromise about requiring supervisory approval for the use of a same day vacation day -- that the first two used by an employee "are not subject to supervisor approval" and that the "third day is subject to supervisor approval."

All of the witnesses who testified about the parties' bargaining for the Letter of Memorandum were consistent in testifying that, despite the lengthy discussions the parties had about the new vacation rules, they did not discuss the particular issue of contract interpretation now before me -- whether making the Friday use of a same-day vacation day "not subject to supervisor approval" would eliminate the requirement that an employee must be "granted an approved vacation day for Friday or Monday of that weekend" in order to make weekend overtime "voluntary."

Gelhar testified, however, that, as he interpreted Paragraph 6(a), making same day vacation days "not subject to supervisor approval" eliminated the need expressed in Section 9.01(g) to have an "approved vacation day" on Friday or Monday as a prerequisite to "voluntary" weekend overtime. Gelhar

testified that, at the Union's ratification meeting for the current labor agreement, he informed attending members that Paragraph 6(a) would have that effect.

Proulx testified that, if the Union had informed the Employer of its interpretation of Paragraph 6(a) during bargaining -- that the use of a Friday same day vacation, "not subject to supervisor approval" would exempt employees from the requirement of Section 9.01(g) that the employee be "granted an approved vacation day" on Friday in order to make weekend overtime voluntary -- the Employer would not have agreed to the change.

Proulx also testified that the Employer must retain control of the number and skills of personnel working on weekends in order to staff for adequate production and that under the 2009 Vacation Rules the Friday use of same day vacation did not exempt an employee from weekend overtime. Under previous practice, using Paragraph 5 of the 2009 Vacation Rules, supervisors had to approve any use of a same day vacation and, by refusing to grant an "approved vacation day" on Friday, they could control the availability of needed personnel on weekends.

I resolve the issue of contract interpretation as follows. Under Section 9.01(g), an employee can take a vacation day only if the Employer grants "an approved vacation day." Under this provision, the Employer retains the right to approve or not to approve each request. The retention of the right to approve or not to approve each request allows the Employer to keep daily control of the number and skills of personnel needed

to maintain production. The need for the Employer's active consent is expressed in the language of Section 9.01(g), which requires as a pre-condition to treating weekend overtime as "voluntary" that the requesting employee must be "granted an approved vacation day." This language clearly gives to the Employer the right to decide whether each request can be accommodated by production requirements. Because Section 9.01(g) relates not only to the particular Friday (or Monday) vacation requested, but also to exemption from weekend overtime, the Employer can consider production requirements for the vacation day requested and for the weekend that the grant of an approved vacation day would affect.

The language of Section 9.01(g) clearly requires the grant of an approved vacation day on Friday (or Monday) in order to exempt an employee from weekend overtime. This is an active process that preserves the Employer's ability to consider and control the number and skills of personnel on two particular days, the Friday (or Monday) for which vacation is requested and, in addition, a day of weekend overtime.

For the first (or second) use of a same day vacation, the language of Paragraph 6(a), gives the employee the right to a same day vacation without the need for a supervisor's approval. In contrast to the language of Section 9.01(g), however, the language of Paragraph 6(a) says nothing expressly about removing a second day, i.e., a weekend day, from the active approval process by which the Employer preserves its control of available personnel on that additional day.

The difference in language is significant. Paragraph 6(a) provides that the Employer has yielded control of the production personnel on the same day vacation day that is not subject to supervisor approval. The provision does not say expressly that a same day vacation day not subject to supervisor approval is to be considered as approved. The evidence shows that the difference in the meaning and effect of the two provisions is substantive and substantial. The express language of one provision, Section 9.01(g), can, with active approval by the Employer, affect the availability of personnel on two production days, while the express language of the other provision, Paragraph 6(a), can, without the need for the Employer's approval, affect the availability of personnel on only one production day. I rule that the passive non-requirement of approval allowed by Paragraph 6(a) is not the equivalent of the active requirement of an approved vacation day established by Section 9.01(g). A Friday same day vacation that is "not subject to supervisor approval" excuses absence on that day only, whereas the grant of an "approved vacation day" on Friday is required to excuse absence on two days -- the Friday and a day of weekend overtime.

Accordingly, I rule that the Employer did not violate the labor agreement by charging the grievant with an unexcused absence on August 25 and that the Employer had just cause for doing so.

Burden of Proof. The Union argues that the consequence imposed on the grievant for his absence on August 25 -- charging

him with an unexcused absence, thus reducing his allowance of IH hours -- was discipline. The Union argues that, because the grievance challenges discipline, the Employer should have the burden of proving that the discipline was justified under the just cause standard established by Section 18.01 of the labor agreement.

The Employer argues that the primary issue in this case is one of contract interpretation and that it should be treated as any other contract interpretation case, with the burden of proof placed on the Union, as the party alleging violation of the contract.

I resolve the arguments about burden of proof as follows. I agree with the Union that the Employer's action -- charging the grievant with an unexcused absence, thus reducing his IH hours -- was disciplinary. That action moved him slightly closer to a final warning and the termination of his employment under the penalty structure established by the attendance policy. I rule that the Employer has the burden of proving that it had just cause to impose the discipline.

In the present case, the evidence establishing what occurred is not in dispute. The parties agree that the description of what the grievant did and what the Employer did in response is accurate. No issue of fact is presented that relates either to the grievant's actions or to the Employer's response to his actions. I rule that, because this case does not require a nuanced weighing of conflicting evidence in order to determine essential facts, placement of the burden of proof on one or the other party does not affect the result.

AWARD

The grievance is denied.

August 6, 2013

  
Thomas P. Gallagher, Arbitrator